

LIL  
SUPREME COURT

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 356

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EMANUEL BROWN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED AUGUST 8, 1957

CERTIORARI GRANTED APRIL 7, 1958

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

No.

UNITED STATES OF AMERICA, Appellee,

v.

EMANUEL BROWN, Appellant.

**APPENDIX TO APPELLANT'S BRIEF**

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES

v.

EMANUEL BROWN

Crim. No. C 152-265

**DOCKET ENTRIES**

Violation—Contempt of Court. Refusal to answer  
questions before Grand Jury.

Date	Cash	Acct.	Deft.	Rec'd	Disb.
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4-9-57	Emanuel Brown	.....		5.—	
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4-12-57	Pd. U. S. Treas.	.....			5.—
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Dated	Proceedings by the Court
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4-8-57	Emanuel Brown having been directed by the Court to answer certain questions put to him by the Grand Jury, and having refused to answer said questions, the government moved to
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**Proceedings in the United States Court of Appeals  
for the Second Circuit—Continued**

**Appendix to appellant's brief consisting of pro-  
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[fol. A]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

No.

UNITED STATES OF AMERICA, Appellee,

v.

EMANUEL BROWN, Appellant.

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questions before Grand Jury.

Date	Cash Acct. Deft.	Rec'd	Disb.
4- 9-57	Emanuel Brown .....	5.—	
4-12-57	Pd. U. S. Treas. ....		5.—

Dated                      Proceedings by the Court

4- 8-57 Emanuel Brown having been directed by the  
Court to answer certain questions put to him  
by the Grand Jury, and having refused to an-  
swer said questions, the government moved to

have Emanuel Brown adjudged guilty of contempt of Court. The Court adjudges the witness Emanuel Brown guilty of contempt of Court.

LEVET, J.

- 4- 8-57 Filed certificate and Order adjudging Emanuel Brown guilty of contempt of Court and sentencing him to imprisonment for a period of One Year and Three Months at a place of confinement to be designated by the Atty Genl.

LEVET, J.

- [fol. 2] 4- 8-57 Emanuel Brown to surrender for service of sentence on 4-9-57 at 4 PM. Released on own recognizance.

LEVET, J.

- 4- 8-57 Issued certified copies of order to U. S. marshal.

- 4- 9-57 Emanuel Brown surrenders to U. S. Marshal.

- 4- 9-57 Filed notice of appeal to the US CA.

- 4-16-57 Defendant's attorney moves for bail pending appeal. Motion granted. Bail fixed at \$5000. on consent of government and defendant's motion enlarging bail limits to New Jersey is granted.

LEVET, J.

- 4-16-57 Filed a true copy of order received from the US CA.—Ordered that bail be and it hereby is granted in a sum to be fixed by the U.S. Dist. Court for the So. Dist. of NY. Further ordered that the argument of the appeal be and it hereby is set for May 6th, 1957. Further ordered that in the event that the appellant's record, brief and appendix are not filed by May 2, 1957, appellant will become subject to being taken into custody once more. A. DANIEL FUSARO, Clerk.

- 4-17-57 Filed transcript of record of proceedings dated April 5, 8, 1957.

[fol. 3]

IN UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER APPEALED FROM—April 8, 1957

Emanuel Brown, having appeared before the United States Grand Jury for the Southern District of New York on April 5, 1957, and having refused to answer certain questions, and on April 5 and April 8, 1957, a hearing having been had, and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell and Charles H. Miller, Assistant United States Attorneys, of counsel, for the United States of America, having been heard, and the defendant having been directed to answer said questions by the Honorable Richard H. Levet, United States District Judge for the Southern District of New York; and the defendant having again appeared before the United States Grand Jury for the Southern District of New York on April 8, 1957, and having refused to answer said questions as directed by the Court, and having again appeared before the Honorable Richard H. Levet on April 8, 1957, and having refused to answer said [fol. 4] questions when put to him by the Court; and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell and Charles H. Miller, Assistant United States Attorneys, of counsel, for the United States of America, having been heard, and due deliberation having been had thereon, and upon all proceedings heretofore had herein; it is

Ordered, that in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, the defendant, Emanuel Brown, hereby is found to be in contempt of this Court for violation of Title 18, United States Code, Section 401(3), and is hereby committed to the custody of the

Attorney General, or his authorized representative, for imprisonment for a period of one year and three months.

Dated: New York, N. Y., April 8, 1957.

Richard H. Levet, U. S. D. J.

4/8/57.

Defendant to surrender to U. S. Marshal on 4/9/57 at 4 P.M. Released on own recognizance.

Levet, J.

[fol. 5]

IN UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CERTIFICATE OF DISTRICT JUDGE PURSUANT TO RULE 42(A) OF  
THE FEDERAL RULES OF CRIMINAL PROCEDURE—  
April 8, 1957

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that the following acts were committed in the presence and the hearing of the Court and constitute a contempt of the Court:

On April 5 and 8, 1957, the defendant Emanuel Brown was brought before me and in the presence of the United States Grand Jury for the Southern District of New York, certain questions were read, and the defendant claiming that he was privileged to refuse to answer said questions on the ground of self-incrimination, and after a hearing was had in which it was established that the said Grand Jury was conducting an investigation under Chapter 8 of Title 49, United States Code, and that the said defendant had been called to testify as a witness in the said investigation, and after hearing arguments by Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell and Charles H. Miller, Assistant United States Attorneys, of counsel, for the United States of America, and in view of the provisions of Title 49, United States Code, Sections 46 and 305(d), I directed the defendant to answer those questions.



On April 8, 1957, Emanuel Brown was again brought before me and in the presence of the United States Grand Jury for the Southern District of New York, I put to him the same questions which he refused to answer after having been directed to do so and failed to state any valid [fol. 6] reason why he should not be held in contempt of this Court. The questions which were asked are as follows:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T & R Trucking Company?

Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?"

Accordingly, in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, I summarily found Emanuel Brown in contempt of this Court and committed him to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and three months.

Dated: New York, N. Y., April 8, 1957.

Richard H. Levet, U. S. D. J.

[fol. 7]

IN UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter  
of

EMANUEL BROWN, a witness before the April 1957  
Grand Jury.

Before—Hon. Richard H. Levet, District Judge.

Transcript of Proceedings of April 5, 1957

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, for  
the Government; by Herbert M. Wachtell, Esq.,  
and Charles H. Miller, Esq., Assistant United  
States Attorneys.

Myron L. Shapiro, Esq., Attorney for the Witness.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Outline what you state is the procedure.  
This is public, I presume.

Mr. Wachtell: It is the procedure that the courtroom  
should be cleared except the necessary personnel.

The Court: I will direct the marshal to clear the court-  
room if there are persons who have no business here.

(The courtroom was cleared of all but the interested  
parties.)

Mr. Wachtell: If your Honor please, the April 1957  
regular Grand Jury, requests that the aid and assistance  
[fol. 8] of the Court in a direction to a witness, Emanuel  
Brown, who has appeared before the Grand Jury in a matter  
now under investigation, and who has refused to answer  
certain questions put to him on the ground that answers  
thereto might tend to incriminate him.



It is the position of the Government, if I may briefly refer to it, that the matter under investigation by the Grand Jury is an alleged violation of certain provisions of the Motor Carriers Act of the Interstate Commerce Law.

As provided under Section 305(d) of Title 49, which is included in the Motor Carriers Act, there is a section providing for immunity from prosecution for any witness who testifies in a matter arising out of an investigation, immunity as to any matter arising out of the subject matter of his testimony.

Mr. Shapiro: If your Honor please, I am sorry to interrupt Mr. Wachtell, but if he is proceeding directly to the hearing, I would like to put my position on the record. However, if we are continuing colloquy on the record, rather than off the record, I will not interrupt him.

Mr. Wachtell: I am going to get to the procedural question in a moment.

This witness, as I have stated, now appears before the Court with the Grand Jury, the Grand Jury making a request of the Court that he be directed to answer certain questions. The Government feels that at this time the witness is present and he is accompanied by his attorney here in court, and at this time he is entitled to a full hearing as to any issues of fact or law which may be raised as to why he should not be directed to answer these questions.

[fol. 9] The Government, in connection with its position, will refer to the case of *Carlson v. United States* in the First Circuit, 209 Fed. 2d 209, and there are cases in this circuit such as *United States v. Curcio*, *United States v. Trock*, *United States v. Gordon* and *United States v. Courtney*, in all of which the procedure which the Government is now requesting has been followed in the District Court and has been expressly or tacitly approved in the Court of Appeals.

The Government would further request that at the termination of this hearing, if the Court determines that the witness in fact must answer the questions, that the Court direct him to answer the questions. At that point it would be the Government's intention to have the Grand Jury

and the witness return to the grand jury room, at which point the same questions would be put to the witness.

Should he refuse to answer there, the Government would again request the Grand Jury and the witness to come before the Court, at which point the Government would request the Court once again to put the same questions to the witness, and should the witness at that point refuse to answer the questions, the Government would ask that he be held summarily in contempt, according to the procedure of Rule 42(a) of the Federal Rules of Criminal Procedure, and for a violation of Section 401, subdivision 3, which makes punishable as contempt the disobedience of a lawful order of the court. Again this is the procedure that was followed in the cases that I have cited to your Honor. There is only one other fact that I would wish to refer to at this point, and that is that on March 25th, which was last week, Mr. Miller, of the United States Attorney's office, and I had a conference with Mr. Shapiro, the attorney for the witness Brown, at which time Mr. [fol. 10] Shapiro was advised that the Government would have Mr. Brown before this Grand Jury in the matter that is now pending and that the Government would ask that he be compelled to answer the questions and would proceed, if necessary, to compel him to answer such questions.

The Court: Would you outline briefly, if it is proper at this time, the general nature of the inquiry. You said it was related to certain shipments.

Mr. Wachtell: Yes, your Honor, we can do that under my statement, or if we get over the procedural hurdle, we can call the Grand Jury reporter.

The Court: Just a very brief sketch.

Mr. Wachtell: Very briefly, the witness Emanuel Brown, is a principal in interest of Young Tempo, Inc., which is a garment manufacturing firm, a dress manufacturing firm, here in New York City. It is the Government's information that Young Tempo, Inc., has used in the past as a trucking company the T & R Trucking Company or the T & R Cutting Company. Apparently, both names have been used for this company.

This trucking company, it is the Government's information, has trucked dresses for Young Tempo, Inc., and for an affiliated company, the Acme Dress Company of Midvale, New Jersey, between Young Tempo here in New York and Acme in New Jersey.

It is further the Government's information that this T & R Trucking Company is in fact owned by one John Dioguardi, though nominally in the name of Theodore Rij. It is further the Government's information that contrary to law this T & R Trucking Company neither applied for nor received a permit from the Interstate Commerce Commission to operate as a contract truck between New York, New York, and Midvale, New Jersey. [fol. 11] That is the matter that is now before this Grand Jury.

The Court: Very well.

Mr. Shapiro: If your Honor please, in view of the statements by Mr. Wachtell prior to the time that he went on the record that the Government's position was that this was the only hearing we were entitled to, I hereby apply and request that we have a reasonable adjournment and a notice from the Government of the specifications or charges for which we are having this hearing so that we can prepare for this hearing and be able to properly represent our client.

The Court: I do not think you are entitled to it under the rule.

Mr. Shapiro: I respectfully except.

Mr. Wachtell: As a practical matter, your Honor, I do not know what Mr. Shapiro could be told at this time other than what he was told way back in March, on March 25th. It is a simple matter. I think there were five or six questions put to the witness before the Grand Jury. The witness declined to answer each of them on the ground that it might tend to incriminate him.

He was advised that in view of the fact that the immunity statute applied here and it was a valid immunity statute, the Fifth Amendment plea could not be interposed.

He was permitted freely to leave the grand jury room and consult with his attorney upon each request that he made.

I advised Mr. Shapiro way back on March 25th that when the witness appeared before the Grand Jury it was going to be as I have stated. I advised him that this ICC investigation was going to be under way. The witness was served with a subpoena specifying the section [fol. 12] of the Interstate Commerce Act which the Grand Jury was investigating. I specifically told Mr. Shapiro, called his attention to the immunity statute that the Government intended to utilize, and the sole matter was whether the witness should be directed to answer these questions.

The Court: I do not see any reason for further delay.

Mr. Shapiro: I respectfully except, your Honor.

I would like the record, so far as this conference of March 25th is concerned, as far as I was concerned and am concerned, that was merely a statement of the Government's legal position to me, and I do not see how it bears on the issue as to whether we should have at this point an adjournment and a notice in order to prepare for the hearing which we are told is the only hearing that we are going to have.

Mr. Wachtell: May I inquire through the Court whether we could have an offer of proof as to what counsel would endeavor to establish at this hearing? Perhaps there might be a different situation here.

The Court: Yes. What is the proof?

Mr. Shapiro: There are a number of things which it might be necessary to investigate as a matter of preparation. There are also legal questions which have to be further examined in order that this man may be adequately represented. This is not just a grand jury which is appearing out of the blue, to investigate this man. This man was eleven times before another grand jury, and he is still under subpoena before another grand jury investigating the aspects of all of these companies and individuals mentioned by Mr. Wachtell. So the situation is not as simple—not simply an investigation of the interstate commerce, the possible interstate commerce violation. It has ramifications. I respectfully state to the Court as an attorney [fol. 13] that in order to prepare properly for this hearing, I require additional time.



The Court: What additional testimony would you adduce?

Mr. Shapiro: I would like to look into the question as to whether I can compel the production of the grand jury minutes of prior investigations to ascertain the purpose of this investigation. I would like further to look into the law.

The Court: How could the first point you mention shed any light on this problem.

Mr. Shapiro: Because in my opinion, your Honor, this grand jury investigation is being used as a means of circumventing the exercise by my client of the privilege before the other grand jury and for the further reason that I am not convinced as yet, contrary to Mr. Wachtell's statement, that he does obtain immunity by this testimony.

The Court: Give me that section.

Mr. Wachtell: 305, subdivision (d) Title 49.

The Court: Is that all?

Mr. Wachtell: If I may read to your Honor beginning about midway down the section, and commencing after the semicolon: " \* \* \* and any person subpoenaed or testifying in connection with any matter under investigation under this chapter" and, parenthetically, that refers to the Motor Carriers Act, "shall have the same rights, privileges and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title" and that refers to the railroad section of the interstate commerce statute, "unless otherwise provided in this chapter."

[fol. 14] Then, your Honor, referring to Title 49, U. S. Code, Section 47, which is in Title 1, it provides:

"No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of alleged violation of chapter 1 of this title on the ground or for the reason that

the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

And then it continues to say that the statute does not refer to perjury committed in the testimony itself.

The Court: You contend that those sections taken together give immunity to this witness?

Mr. Wachtell: Quite definitely, your Honor.

The Court: What is the question about it then? What is the legal question?

Mr. Shapiro: I do not find it as easy to say as Mr. Wachtell does that both of these sections together give immunity. May I have that, please?

[fol. 15] Mr. Wachtell: Yes (handing).

Mr. Shapiro: 305(d), which is part of the Motor Carriers Act, enacted many years after chapter 1 of the Interstate Commerce Commission Act, provides with respect to the duties and powers of the Commission to investigate possible violations of the Interstate Commerce Act.

The Court: You mean that does not cover a grand jury?

Mr. Shapiro: It does not cover a grand jury, in my opinion, your Honor, because the language is related, and it can only be taken to mean that the immunity intended to be granted under 305(d) applies only to investigations before the Commission, and Congress did not intend under this section to extend it to grand jury investigations.

Now there are other sections of the Interstate Commerce Act where Congress incorporated by reference the immunity section, referring to Section 1017. I think they have different numbers in the United States Code Annotated.

Mr. Shapiro: In 916(a).

The Court: Title 49?

Mr. Shapiro: Title 49, dealing, I believe, with water carriers or forwarders—water carriers—“ \* \* \* the provisions of Section 1217 and 46-48 of this title shall apply with full force and effect in the administration and enforcement of this chapter.”

And in 1017(a) they say “The provisions of Section 1217 of this title, together with such other provisions of chapter 1 of this title as may be necessary for the [fol. 16] enforcement of such provisions, and of Sections 46-48 of this title \* \* \* shall apply with full force and effect in the administration and enforcement of this chapter.”

There are in these two sections, 916(a) and 1017(a) quite a difference in the language used by Congress.

There is no dispute that if this investigation were brought under 916(a) and 1017(a) that Mr. Wachtell would be correct, because Congress intended to extend this immunity through the Motor Carriers Act.

305(d) starts off “So far as may be necessary for the purposes of this chapter, the commission and the members and examiners thereof and joint boards”—no reference to grand juries, prosecutor or attorney general or U. S. attorney—“shall have the same power to administer oaths and require by subpoena the attendance and testimony of witnesses and the production of books, et cetera, and to take testimony by deposition relating to any matter under investigation as the commission has in a matter arising under chapter 1 of this title.”

That is the only power of investigation granted under the statute here to the Commission, and then it says, “Any person subpoenaed or testifying in connection with any matter under investigation,” and they use the exact same language as appeared in the prior clause, “shall have the same rights, privileges and immunities \* \* \* as though such matter arose under chapter 1 of this title.”

I say that under 305(d) the immunity provision does not extend to a grand jury investigation and can only be held or restricted to investigations before the commission.



That is why we claim in the first instance that our client here, the respondent or whatever you want to call him, does not have immunity despite Mr. Wachtell's claim. [fol. 17] There are other grounds, but I do not know whether at this point I ought to go into them.

Mr. Wachtell: I would first point out, your Honor, that Mr. Shapiro's statement shows that he is clearly and fully prepared on the question of the law, which is the only question before the Court. I say that as a preface. Here the only question is interpretation of the statute, and the statute is completely unambiguous. Mr. Shapiro's citation of other sections of the interstate commerce law concern water carriers and Sections 916 and 1017 involve different methods of transportation, and where there are likewise, references to the incorporation of the immunity statute, merely show quite clearly that the prevailing congressional intent, and I state that the provisions of intent in the motor carriers section and the water carriers section and the other sections which came after the railroad, the initial section of the interstate commerce law, that its intent was to stick as closely as possible and exactly to the same the administrative structure and remedies and enforcement methods as existed under the enforcement of the railroad section initially.

As a matter of fact, Section 46, which I read, is the prototype of the immunity section, not only for the sections of the interstate commerce law, but that has been the prototype and the immunity section which has subsequently been incorporated by reference generally through the federal law.

When World War II came along and Congress enacted the OPA statute, they went right back to Section 46 and incorporated that by reference as to immunity, and the reason for that is that Section 46 was the first valid Congressional immunity statute and was upheld by the Supreme [fol. 18] Court in *Brown v. Walker*, which, incidentally, is a grand jury contempt case, and subsequently the Congress of the United States by reference to this continued to refer back to this Section 46 whenever it wanted to pass one of these general immunity statutes.

Mr. Shapiro is quite——

The Court: In other words, there has been legislative recognition of the effect of the Brown case?

Mr. Wachtell: Correct. The original ICC statute—immunity statute was invalid and held invalid in the case of Counselman v. Hitchcock. Subsequently Congress amended the immunity statute to make it broad enough to cover the constitutional privilege and the statute was then upheld in Brown v. Walker. Subsequently that has been the prototype and the model for further Congressional immunity statutes.

Mr. Shapiro is quite accurate when he says that subsection (d) of 305 starts off with the powers of the Commission. That subdivision (d) is quite clearly in two parts, and the two parts are split by the semicolon. Of course that subsection (d) does not give power to the grand jury or the courts. They already have that. They have the power to subpoena witnesses and compel testimony without any grant of authority by the Interstate Commerce Commission Act. It did start off by saying that the Commission, under the motor carriers section, shall also have the power to subpoena witnesses, et cetera. Then there is a semicolon, and the section goes on " . . . and any person subpoenaed or testifying in connection with any matter under investigation under this chapter," but it does not say any matter under investigation by the Commission. [fol. 19] The Court: That is broad.

Mr. Wachtell: It says "any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities and penalties as though such matter arose under chapter 1 of this title."

The only thing that we can find as to chapter 1 is that it states the witness is entitled to immunity, which is in Section 46, which had previously been passed and recognized and upheld by the courts, and it is quite clear what they are referring to there.

The Court: Are there any other substantial legal questions?

Mr. Shapiro: Yes. I would like to make more reference to this. In the matter under investigation as contained in the first clause of this—

The Court: Is that so? Does it say so by those words?

Mr. Shapiro: It says in the first clause "any matter under investigation," referring to the power of the Commission, and then in the second clause it says "any person subpoenaed or testifying shall have the same rights" in connection with any matter under investigation under that chapter. Therefore there is a repetition in the second clause of the exact language in the first clause. I say that necessarily that is limited to investigations by the Commission, and is a principle of statutory construction. The words "with any matter under investigation, under this chapter," to that must be added the words "brought by the Commission," because I think that is a necessary implication of the statutory construction.

The Court: Are you familiar with the *Brown v. Walker* case?

[fol. 20] Mr. Shapiro: I am, your Honor.

The Court: Wasn't that a case where there had apparently been this point raised, to that effect?

Mr. Shapiro: No, not the point that I am raising.

The Court: He is applying it to a grand jury investigation. Congress passed legislation afterwards and the rule of statutory adoption prevails, doesn't it?

Mr. Shapiro: You have two questions here, your Honor. You have the question as to whether Congress has properly or sufficiently incorporated by reference Section 46 of the Interstate Commerce Act into this section.

The other question in *Brown v. Walker*—I have examined it—and the argument was not raised, and I say to your Honor that there is very serious question in my mind as to the language of Section 46 as to whether it clearly applies the immunity part to the grand jury investigation. The question was not argued in *Brown v. Walker*. That was not the issue before the Court, as I read from the report of the law edition, I do not see any point raised there as to whether it applied to a grand jury investigation.

I would like also to point out to your Honor that 305(d) states "So far as may be necessary." This section also concludes "unless otherwise provided in this chapter."

I think that Mr. Wachtell will agree with me that it is

elementary that the immunity must be as broad as the privilege in order to be effective. Where the statute says "So far as may be necessary for the purposes of this chapter," and then says "unless otherwise provided in this chapter," it would seem to me quite clear that even if you took Section 46 into this section, that the immunity [fol. 21] cannot be as wide as the privilege because necessarily the statute says "So far as may be necessary for the purposes of this chapter," may very well operate to limit the immunity, and this man might unwittingly put himself in the position where, by failing to claim the privilege, he would be giving incriminating testimony.

The Court: Is that all on that particular point?

Mr. Shapiro: On that particular point.

The Court: What else?

Mr. Shapiro: With respect to the question of law, I think it is a mixed question of law and fact, but I do not think Mr. Wachtell would dispute the facts that, I think, a year ago—

Mr. Wachtell: May I suggest that we call the reporter and have the record read, the reporter for the grand jury.

The Court: Yes, let the record be read and we will proceed, if necessary, or take an adjournment. It is approaching the noon hour anyway.

[fol. 22] MARGARET D. CONNOLLY, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Mrs. Connolly, are you a grand jury reporter duly sworn and authorized to take testimony before grand juries in the Southern District of New York?

A. I am.

Q. Were you performing your functions in that regard before the April 1957 regular grand jury this morning?

A. Yes.



Q. And did you make stenographic notes of the testimony of the witness Emanuel Brown?

A. Yes.

Q. And those stenographic notes, to the best of your ability, represent a true record of the proceedings with reference to the witness Emanuel Brown?

A. Yes.

Q. Would you read them to the Court.

A. From the beginning?

Mr. Wachtell: Yes.

The Court: And will you speak up so that we can all hear you.

The Witness: Yes, sir.

"Q. Will you state your full name, sir, for the record.

"A. Emanuel Brown, 1960 East Tremont Avenue, Bronx 62, New York.

"Q. Mr. Brown"—

Q. May I interrupt? Was the witness previously sworn?

A. Yes, the witness was sworn by the foreman.

"Q. Mr. Brown, have you come here today with your attorney?

"A. Yes, I have.

"Q. What is your attorney's name, sir?

"A. Mr. Shapiro.

[fol. 23] "Q. Is that Myron Shapiro?

"A. That's right.

"Q. Is Mr. Shapiro in the anteroom outside of this grand jury?

"A. Yes, sir.

"Q. I would advise you, sir, that I am sure the foreman, should the occasion arise, will at reasonable intervals allow you to consult with your attorney if you feel you desire to do so.

"A. Thank you.

"Q. Mr. Brown, have you received a subpoena, grand jury subpoena calling for your appearance before this grand jury?

"A. Yes, sir.

"Q. Do you have the grand jury subpoena card with you?

"A. Yes, sir.

"Q. May I have that please, sir. May the record note that the card that has been handed up to me by Mr. Brown is a copy of a subpoena calling for Mr. Brown's appearance before the United States Grand Jury. The subpoena was originally returnable on April 3rd but I will state that in consultation with Mr. Brown's attorney and upon his attorney's request the appearance was then fixed for today, April 5th. The subpoena further states that Mr. Brown is directed to appear before this grand jury, and now I quote, 'to testify all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49, United States Code.'

"I return this card to you, Mr. Brown.

"Mr. Brown, are you associated with Young Tempo, Incorporated?

"A. May I speak to my attorney, please?

"Mr. Wachtell: Yes.

"The Foreman: Yes.

"(Witness goes out of room.)

"(Witness returns.)

[fol. 24] "Q. Mr. Brown, you understand, of course, that you are still under oath?

"A. Yes, sir.

"Q. Have you consulted with your attorney?

"A. Yes, sir.

"Q. Could we have the question read.

"Question read as follows:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Q. Mr. Brown, I will advise you at this time that this grand jury is conducting an investigation for possible violations of the Interstate Commerce Commission laws, specifically, the sections that were specified on the subpoena served upon you and which I have read into the record previously. I will further advise you, sir, that under Title 49, United States Code, Section 305(d), The

Congress of the United States has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Section of the Interstate Commerce laws which includes the sections involved in the present grand jury investigation, the Congress of the United States has provided that any such witness shall by virtue of his testimony be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony. Now that granting of immunity is as broad as the constitutional protections which you would otherwise have under the Fifth Amendment. Consequently, as by your testimony here you will receive such a grant of immunity, I will advise you and as I am sure you know—I have previously discussed this matter with your attorney, Mr. Shapiro—[fol. 25] I will advise you that you do not have any privilege to plead the Fifth Amendment as to the questions which are going to be put to you before this grand jury. Accordingly, sir, I will now ask that the Foreman direct you to answer that question.

“Foreman: As requested, will you answer that question?”

“Witness: May I see my attorney again, please?”

“Mr. Wachtell: I would suggest it, Mr. Foreman.

“Foreman: Go ahead.

“Witness: Thank you.

“(The witness goes out.)

“(The witness returns.)

“Q. Mr. Brown, you understand again, of course, that you are still under oath?

“A. Yes, sir.

“Q. Have you consulted with your attorney?

“A. Yes, sir.

“Q. Madam Reporter, may we again have the question read.

“(Stenographer reads: ‘Mr. Brown, are you associated with Young Tempo, Incorporated?’)

“A. I still respectfully refuse to answer that question.

“Q. So that the record may be clear, Mr. Foreman, may I again ask that the witness be directed to answer the question.



"Foreman: As requested, do you still refuse to answer the question?

"Witness: Yes, sir.

[fol. 26] "Q. Upon what ground, sir?

"A. The grounds of self-incrimination.

"Q. Have you understood the statement that I've previously made, sir, that under the law you may not claim that privilege here today?

"A. I understood what you told me.

"Q. Do you further understand that under these circumstances you may be brought before a judge of this court and directed to answer this and other questions?

"A. If you tell me that, yes.

"Q. Do you further understand that should a judge of this court agree that you are required to answer these questions, and should you persist thereafter in refusing, you may be held in contempt of court?

"A. May I consult with my attorney on that?

"Mr. Wachtell: Yes.

"Witness: Thank you.

✓ "(The witness goes out.)

"(The witness returns.)

"Q. Again, Mr. Brown, you understand that you are still under oath?

"A. Yes, sir.

"Q. And again, have you consulted with your attorney?

"A. Yes, sir.

"Q. Are you prepared to answer the question?

"A. Would you read that question to me again, please?

"(Stenographer reads: 'Q. Mr. Brown, are you associated with Young Tempo, Incorporated?')

"A. Is that the question you had reference to or the last question?

"Q. I believe that that is the only question that has been put to you, sir, after the few preliminaries as to [fol. 27] whether you were served.

"A. My answer on that is still the same. I refuse to

answer because by answering I may tend to incriminate myself.

"Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T & R Trucking Company?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman, on the same grounds, I will ask that the witness be directed to answer the question.

"Foreman: You have heard the request. Do you still refuse to answer the question?

"Witness: I still refuse.

"Mr. Wachtell: Mr. Foreman, so that the record could be clear, could it be sure that he is being directed in so many words by the Foreman to answer the question.

"Foreman: Will you answer the question as put to you?

"Witness: I still refuse to answer the question, sir.

"Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman, again may the witness be directed to answer?

"Foreman: As Foreman of this Grand Jury, I direct you to answer that question.

[fol. 28] "Witness: I refuse to answer under the same grounds.

"Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman, again may the witness be directed to answer?

"Foreman: As Foreman of this jury I direct you to answer the question put to you.

"Witness: I refuse to answer on the same grounds, sir.

"Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Q. Again, Mr. Foreman—

"Foreman: As Foreman of this jury, I direct you to answer the question as put to you.

"Witness: I refuse on the same grounds, sir.

"Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

"A. I refuse to answer because by answering I may tend to incriminate myself.

"Mr. Wachtell: Mr. Foreman—

"Foreman: As Foreman of this jury I direct you to answer the question as put to you.

[fol. 29] "Witness: I refuse on the same grounds.

"Mr. Wachtell: Mr. Foreman, may we have the witness excused temporarily to remain outside of this grand jury for further instructions?

"Foreman: You're excused, please.

"Witness: Yes, sir.

"(The witness goes out.)"

Mr. Wachtell: No further questions.

(Witness excused.)

#### COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Would this grand jury have normally remained this afternoon?

Mr. Wachtell: They would not, your Honor.

The Court: When would the next day be?

Mr. Wachtell: If they are to attend to this matter, it would be Monday morning.

The Court: Are there other witnesses to be heard before the grand jury Monday morning?

Mr. Wachtell: No, there are not.

The Court: I do not want to keep them this afternoon unless it is imperative to have this disposed of. Is it?

Mr. Wachtell: I was going to request this, your Honor. In view of the fact that apparently this is for the moment, going to resolve itself into a legal question—

The Court: It is largely a question, a legal question, isn't it?

Mr. Wachtell: —that counsel stipulate that the presence of the grand jury is not required for the time being before the Court.

Mr. Shapiro: I have no objection.

[fol. 30] The Court: Isn't it solely a legal question, as to the application of these statutes?

Mr. Shapiro: We have this mixed question of law and fact. I would appreciate the adjournment, if your Honor please.

Mr. Wachtell: I do not think it requires the grand jury at this time.

The Court: Are you willing to stipulate that for the present at least the grand jury be excused?

Mr. Shapiro: I have no objection.

The Court: Is that satisfactory to you, Mr. Wachtell?

Mr. Wachtell: Quite satisfactory.

The Court: Then the grand jury may be excused.

When will they be asked to return?

Mr. Wachtell: That depends on whether this matter is going forward on Monday or not.

The Court: Would there be other testimony required here? Would there be other questions with reference to this contempt question?

Mr. Wachtell: The Government does not have any other testimony, your Honor.

The Court: In other words, you are submitting this, in effect, upon the basis of the statutes and the questions which have been raised?

Mr. Wachtell: Yes. The Government's position is that the questions, on the face of them, are relevant and material to the investigation. There is no further evidence.

The Court: Is there any other possible testimony from the witness here?

[fol. 31] Mr. Wachtell: Not from the witness, as apparently he has taken the position that he is not going to answer any relevant questions.

Mr. Shapiro: I object to that. I do not think that kind of a statement should be made.

The Court: We will take a recess. Suppose the grand jury comes at two on Monday instead of for the morning hour?

Mr. Shapiro: Two o'clock on Monday.

The Court: Then if we need any further proceedings here, that can be accomplished.

Mr. Wachtell: I do not know what the jury's wishes are. They usually sit mornings.

The Court: Is there any objection to coming Monday afternoon instead of in the morning? If so, speak up.

Apparently not.

A Juror: I will have to be excused.

The Court: That is one.

A Juror: I will have to be excused.

The Court: Two o'clock.

The Foreman: That will be satisfactory.

The Court: Make it two o'clock. The jury may be excused now.

(The grand jury retired.)

The Court: Do you want to mention any other legal matters?

Mr. Wachtell: The Government will just briefly state its position. The witness has been properly subpoenaed before the grand jury, proper and relevant questions have been put to him and he has refused to answer them on the [fol. 32] ground of privilege given by the Fifth Amendment. An applicable, constitutional and completely legal and proper immunity statute gives him immunity coextensive with the protection that the Constitution would otherwise give him. For that reason I think he should be directed to answer the questions.

Mr. Shapiro: If your Honor please, I do not think that



I will refer again to my prior argument on Section 305(d) and Section 47.

I would like to raise some additional matters.

As I started to tell your Honor, back last spring when Mr. Brown was served with a subpoena to appear before another grand jury—

The Court: Where?

Mr. Shapiro: In this building. A special grand jury, I believe it is.

Mr. Wachtell: I believe Mr. Brown, if my recollection is correct, appeared before two different juries. I think his initial appearance was before a regular grand jury.

The Court: What did those matters relate to?

Mr. Wachtell: His first appearance before the grand jury, the regular one, related to the Victor Riesel obstruction of justice case, the case generally in relationship to some of the prospective defendants and the location of a Theodore Rij, who was then a fugitive.

His subsequent appearance before, I think, the March second special March 1956 grand jury, and was a racket grand jury investigating or relating to alleged racketeering in the garment trucking industry.

[fol. 33] The Court: Very well.

Mr. Shapiro: If your Honor please, I did not know there were three grand juries. I assumed that it was all one grand jury. I cannot tell you before which grand jury this occurred, but before one of the grand juries everything was gone into with relationship—to the relationship between the T & R Trucking, Young Tempo, Acme Dress, John Dioguardi, all these matters—

The Court: You mean with this witness Brown?

Mr. Shapiro: With this witness Brown, and a complete investigation made at that time. He is still under that subpoena, which was returnable here on April 19th. He has not been excused from that subpoena.

The Government now starts another grand jury investigation, claiming that it is under the Interstate Commerce Act.

The Court: Excuse me. Do you contend that this waiver of immunity would not apply to the other grand jury investigations; that he might be in difficulty that way?

Mr. Shapiro: I claim, number one, that his immunity might not extend to that grand jury. Number two, that by artful use of this grand jury, the United States Attorney may, by such conduct, abrogate his protection of the Fifth Amendment before the other grand juries, not giving him an immunity to which the Government now says he is entitled to under this section.

There is a very significant statement, if your Honor, please, in these minutes. When Mr. Wachtell was telling [fol. 34] the witness what his immunity was, he said, "Your immunity will be from federal prosecution." So that even here, although *Brown v. Walker* says that the immunity should extend to state prosecutions, the Government had him there ready to testify, but was telling him that he was only entitled to immunity from federal prosecution. So that the area of state prosecution still remains open under this questioning by Mr. Wachtell.

But getting back to this other grand jury, the use of this grand jury in connection with the other proceeding, in my opinion, may be such as to deprive Mr. Brown of his constitutional rights, and even of his right of immunity under this statute by the use of these grand juries by the United States Attorney. He may so question and derive information as to enable him to circumvent the protection or the privilege before the other grand juries.

The Court: What do you mean by that? I don't follow you.

Mr. Shapiro: I state very clearly for the record that before the grand jury—the other grand juries, Mr. Brown has, in the main, as I understand it, claimed his Fifth Amendment.

The Court: And has not testified.

Mr. Shapiro: And has not testified. But Mr. Wachtell—

The Court: He has not refused as to the other grand juries?

Mr. Wachtell: He did testify to some extent, your Honor.

[fol. 35] The Court: Does it go into this area which you seek now in these four or five or six questions?

Mr. Wachtell: His testimony went part way into the area which the present grand jury is investigating. He did



not testify to certain matters which in the present grand jury are relevant to the interstate commerce law violations and will go into.

It is quite possible that a few of the questions that he testified to, that turned into these test questions, a few preliminary questions which would lead to further inquiries before this grand jury, were in fact previously answered by the witness, but the other grand juries were not looking into the violation of any interstate commerce law.

Mr. Shapiro: If your Honor please, I overlooked telling one particular fact about the other grand jury, which I consider very important, and that is that when Mr. Brown came before those grand juries as a witness, at one point he was told by Mr. Wachtell before the grand jury that he was going to be indicted for violation of the internal revenue laws, that the Government is going to obtain an indictment there against him. So that Mr. Brown then turned, at least openly, from a witness to a prospective defendant. He is still in that position. He is still a prospective defendant. He is being compelled here to permit the Government to use this grand jury as a device to get around his proper claim of privilege as to the other grand jury proceedings, to obtain information which may very well result in his indictment, and doing it in such a way as [fol. 36] not to touch upon matters which may be bound up with the internal revenue violations claimed by the Government.

The Court: Is that the feared danger?

Mr. Shapiro: That is the feared danger. It is a very broad danger.

The Court: Involving prosecution?

Mr. Shapiro: That is one of the feared dangers, your Honor. There are others. There were other matters before, but we know that Mr. Wachtell told this witness and business associates of his who were witnesses that they were going to be indicted for violation of the internal revenue laws and we know that that is a clear and present danger as far as these people are concerned, from the Government.

Now the Government comes along and brings another grand jury because they found an immunity statute some-

where, they claim, and they are going to use that as a means of getting around this man's constitutional privilege and getting him to talk to them. I think this is their device and subterfuge. It waters down the immunity and makes it less extensive than the privilege and puts this man in jeopardy.

The Court: Excuse me at this point. Is it your contention that the immunity, even if granted, by this statute, would not be granted to the prosecution under the Internal Revenue Code? Is that your contention?

Mr. Shapiro: It is my contention, your Honor, because this is not a blanket pardon, he has not gotten a pardon from Congress or the President or amnesty. He gets im-[fol. 37] munity only as to those matters concerning which he testified to.

The Court: If it is an immunity it covers any prosecution based upon any of the matters as to which he would not testify, does it not?

Mr. Shapiro: Yes, except in this respect, your Honor. There may be clues and leads developed in this testimony before the grand jury, which in the course of investigation and by the way they are followed and the way they are developed in the other grand jury, that it might not be possible for this man, in case of an internal revenue indictment, to say, "This is based upon testimony before this grand jury."

This is opening the door and enabling the Government to get around his lawful and constitutional claim of the Fifth Amendment in the other grand jury. I am not concerned primarily about the testimony as to the T & R Trucking, but it leaves the door open for them to get clues and leads which may exist as to other things. This is where he has to be protected and this is why I say that this immunity, because of the existence of a prior grand jury investigation and Mr. Wachtell says, "I am going to indict you for violation of the internal revenue laws."

I say that this immunity cannot possibly be as broad as the privilege, and that this is a means adopted by the Government to support that privilege as a device to get around it. It is clever, I must admit. But it is still only

a device, a subterfuge and an artifice, and not proper, in my opinion.

[fol. 38] I would also like to raise one or two other points. There is no proof from the grand jury minutes that this investigation was directed by the Interstate Commerce Commission, that it was directed by the Attorney General. I believe that in this situation the ICC has exclusive jurisdiction. I do not believe that the U. S. Attorney or the grand jury has the right to inquire or initiate this type of investigation on his own. There is no proof of authorization from the Attorney General.

I say further that under Section 46 there is no penalty provided, but we are not up to that point.

There is one other point that I want to refer to, and that is in the Motor Carriers Act itself. I do not recall whether the questions evidenced the fact that Acme Dress is in Midvale. I think there was reference to Midvale, wasn't there, Mr. Wachtell?

Mr. Wachtell: I believe there was, your Honor.

Mr. Shapiro: There was reference to the fact that Young Tempo was in New York?

Mr. Wachtell: Yes.

Mr. Shapiro: Yes.

The Court: New Jersey and New York.

Mr. Shapiro: But as I recall the Motor Carriers Act, there is an exemption where the carriage is between points within a metropolitan district.

Mr. Wachtell: I might state for Mr. Shapiro that Midvale is outside the New York Metropolitan Area.

The Court: Where are the boundaries? How is that determined?

Mr. Wachtell: They extend, encompass some of the area [fol. 39] over in New Jersey. I do not know how available it is.

Mr. Shapiro: Do you have the ICC provisions?

Mr. Wachtell: Your Honor, there is a map which the ICC people put out. I have it right here, your Honor. The Government does not feel it necessary to show in any grand jury investigation that there is a positive showing of the crime, but nonetheless it is quite clear here that Midvale

is outside of the Metropolitan Area, and the Government will show it at this time.

The Court: Mark it in evidence. Let it be part of the record.

Mr. Shapiro: May I see it, please?

The Clerk: Marked Government's Exhibit 1 in re Grand Jury investigation.

(Document handed to Mr. Shapiro.)

The Court: Are we concerned here with any other statutes?

Mr. Shapiro: I beg your pardon?

The Court: Are we concerned here with any other penal statutes?

Mr. Shapiro: As far as jeopardy?

The Court: Yes.

Mr. Shapiro: Well, I think there is a question of conspiracy. There are a number of other statutes which I could refer to, except I do not have their citations right here.

The Court: State statutes?

Mr. Shapiro: State statutes too, your Honor.

Mr. Wachtell: I would like to answer his argument.

[fol. 40] The Court: Go on with your argument.

Mr. Shapiro: Now, I think I have set forth our position.

The Court: Mr. Wachtell will reply to you.

Mr. Wachtell: If your Honor please, basically I do not see that Mr. Shapiro's argument—I do not see just what the witness is complaining about. Mr. Shapiro prefaced his remarks by saying that Mr. Brown had been told that he was a defendant. I think it would be somewhat more accurate to say that he was given the full constitutional warning that he might be indicted by the grand jury. That goes without question. He has not been indicted as yet, and that was several months ago.

The Court: There is not anything out of order there, is there?

Mr. Shapiro: He received the regular warning at the beginning of the session. He was down eleven times, and about the tenth or eleventh time, this was not the usual



warning—"You are going to be indicted for violation of the internal revenue laws." That is not the usual warning.

Mr. Wachtell: I take issue with Mr. Shapiro. He does not have the transcript of the grand jury. I represent to the Court that that is not accurate and nothing was said to him in those words or in substance.

Of course we begin with the basic fact that the witness does not have a right or privilege of any sort not to testify. He merely has a privilege not to incriminate himself. That is being fully taken care of in the instant case. [fol. 41] There is no question about the privilege in the statute being broad as a constitutional protection. So that in any question, that an answer to a question would tend to incriminate him, he is getting an immunity as to anything he may testify to. It goes without saying it is not merely for the ICC laws. It is immunity for the tax laws, the anti-racketeering laws, and if there is anything else that may arise out of the subject matter of this testimony.

I may incidentally point out to the Court that it is not possible for the Court to delineate to what extent that immunity would be. That is a question which would arise, if it ever arises at some future date, where this witness, if he were indicted, if he were indicted for anything, at that time the Court could look back at the testimony given and would, of course, have to determine whether the subject matter of his testimony was such that he obtained immunity. Of course the test there would be coextensive with the test which the Court would initially give to the question as to whether it might tend to incriminate at all. In this connection the courts, of course, have been extremely broad in the interpretation. The Hoffman case in the Supreme Court, as well as the Gordon case by this Circuit, where the privilege was given to the Fifth Amendment, have been extremely broad, and in some cases you might say tenuous. To use the Hoffman language, if it could possibly tend to incriminate, then he is getting full immunity from anything that is the subject matter of his testimony.

[fol. 42] Now with reference to state prosecutions, I think Mr. Shapiro is probably advised of the language in *Brown v. Walker*. That has been held in any number of cases



that it is not necessary for a federal immunity statute to give immunity from state prosecution. And similarly, the possibility of a New York state prosecution does not justify the finding that he will not have to testify in any federal case. This is not a case where by means of federal investigation a state case is being prepared.

I think the most recent case, *Adams v. Maryland*, the Supreme Court, in 1954, stated that it is not necessary for a federal immunity statute to grant immunity from state prosecution.

Of course that would be a question which, should he be indicted by the State, would arise at that time for consideration by the courts.

Mr. Shapiro on the same grounds says that this might tend in some way—and he referred to the fact as to the witness being before other grand juries.

Mr. Shapiro referred to the internal revenue laws. If the questions which are put to the witness here have no conceivable relevancy to the internal revenue laws and could not possibly tend to incriminate him, and are completely separate and apart in every way—and frankly, in modern day life, I do not think it is possible to put a question to a witness which is—but if it would be, of course he would not get immunity. On the other hand, if there is any possible connection with internal revenue laws, any possible [fol. 43] link that might make up the chain, anything that might possibly tend to incriminate him of any violation of the internal revenue laws, or any other statute, he is by virtue of the same testimony, getting full immunity. So he can in no case legitimately incriminate himself. Either the questions are not incriminating and he cannot plead the Fifth Amendment in the first instance, or if they would, in fact, be incriminating, he is receiving immunity. There is no question but what the protection that he is getting here is fully as broad as the constitutional protection to which he is entitled, and that he cannot on that ground refuse to answer.

He has further adverted to the fact that there is no showing that the investigation of the grand jury was authorized by either the Attorney General or the Interstate Commerce Commission. No such showing is required.

There is nothing in the statute which says it must be. The grand jury is an arm of the Court and as such can investigate for any violation of the laws, and that is specifically implemented in Section 322 of Title 49, which provides criminal penalties for violations of the various provisions of the Interstate Commerce laws.

The Court: Very well. Two o'clock on Monday. If you will return here, we will determine what further proceedings are necessary.

Mr. Shapiro: Would it be possible, and does your Honor think it is necessary for us to brief this in any way?

The Court: I do not think so. I think it is largely, a question of statutory interpretation. If you want to send [fol. 44] in this afternoon by four o'clock any citations. I will look at the citations.

Mr. Shapiro: Thank you.

(Adjourned to Monday, April 8, 1957 at 2.00 o'clock p.m.)

## **Transcript of Proceedings of April 8, 1957**

2.00 o'clock p.m.

### **COLLOQUY BETWEEN COURT AND COUNSEL**

The Court: Is the witness here?

Mr. Shapiro: Yes, your Honor.

The Court: In this matter I have determined that the witness must testify as to the questions which were propounded. I believe that the statutory sections, particularly Section 305(d), Title 49 and Section 46 of Title 49 adequately provide for immunity in the instances involved; I believe that the immunity applies to a grand jury, see *Brown v. Walker*, 161 U. S. 59.

I believe in general that the immunity applies in the State Courts, see *Adams v. Maryland*, 347 U. S. 179.

The immunity exists even though no privilege is claimed, see *U. S. v. Monia*, 317 U. S. 424.

The United States Attorney is charged with enforcement of the United States criminal laws and under the Rules of Criminal Procedure I believe that the witness must

answer. Therefore I direct this witness, Emanuel Brown, [fol. 45] to answer the questions propounded as they were repeated before me on Friday.

Have I covered everything?

Mr. Wachtell: I believe so, your Honor.

The Court: Then, therefore, the grand jury will retire and the question will be propounded and whatever happens will be taken up from there.

Mr. Shapiro: If your Honor please, may I have an adjournment in order to consult with my client?

The Court: I do not think any further—do you want just a few minutes?

Mr. Shapiro: No. I would like to have a day or so to discuss it with him.

Mr. Wachtell: The grand jury is here, your Honor. This is not a new matter. It is one where there was a possibility of a decision by your Honor. It is an open matter.

The Court: Of course.

Mr. Wachtell: I do not see any reason for an adjournment.

The Court: I do not see any reason for that, do you?

Mr. Wachtell: I do not. The Government would be perfectly willing to allow him ten or fifteen minutes.

Mr. Shapiro: Ten or fifteen minutes is not enough.

I respectfully except to your Honor's refusal to a reasonable adjournment.

The Court: I do not think it is necessary, under the circumstances. Obviously you should have been prepared for this situation which now ensues.

[fol. 46] Mr. Shapiro: If your Honor please, I would like to indicate my exception to your Honor's decision, on the record.

The Court: I will allow you a half an hour from now, to a quarter of three.

Mr. Shapiro: I would like to call your Honor's attention to the fact that the Curcio case which involves the question of procedure in this district. It is now before the Supreme Court on certiorari. One of the questions on which, if certiorari is granted, this whole procedure the Supreme Court of the United States is going to decide on this question.

The Court: On what question?

Mr. Shapiro: Namely, the question of whether this type

of hearing which we have had here and the procedure that has been followed here is in accordance with the law and the Constitution.

The Court: I do not know that that makes any difference here in this particular situation. I have ruled, I believe, in accordance with the accepted practice.

Mr. Shapiro: If your Honor please, your Honor has not adverted to the question which I raised as to the other grand juries.

The Court: I do not think the fact that this witness has testified before other grand juries affects this situation. I have considered it. I do not believe that it is pertinent at all here. He is immune from prosecution for all matters on which he is questioned before this grand jury. That covers it.

The grand jury will retire. Counsel may have half an hour. At the prescribed time, 2.45, and he is directed, as [fol. 47] I stated, to answer the questions propounded.

Thank you for coming down.

(At 3.15 o'clock p.m. the grand jury returned to the courtroom.)

Mr. Wachtell: May it please the Court, the April 1957 Regular Grand Jury again wishes to request the aid and assistance of the Court with reference to the witness Emanuel Brown.

May the Government have leave to call the grand jury reporter to advise the jury of the proceedings that have been had since our last appearance here?

The Court: Yes.

Mr. Wachtell: Mr. Louis Benson.

Mr. Shapiro: If your Honor please, may I inquire now as to the nature of this proceeding?

Mr. Wachtell: The Government's understanding of the nature of this proceeding is this: At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, as will be shown by the testimony of the grand jury reporter, that the witness is persisting in his refusal, the Government will then request of this Court that the Court itself, in the presence of the grand jury, will put the six



questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule [fol. 48] 42(a) of the Federal Rules of Criminal procedure.

The Court: That is what I propose.

Mr. Shapiro: If your Honor please, I respectfully except to this procedure and state for the record that this is in lieu of a hearing under Rule 42 and the requirements of due process. I request that he be served or furnished with a notice in open court of the charges, the specifications and afforded an opportunity for a hearing, a full hearing.

The Court: The objection is overruled.

Mr. Shapiro: I respectfully except.

The Court: Swear the witness.

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LOUIS BENSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Mr. Benson, are you a grand jury reporter duly sworn and authorized to take testimony before the grand juries sitting in the Southern District of New York?

A. Yes, sir.

Q. Acting in that capacity, did you take stenographic notes this afternoon of the testimony before the April, 1957, regular grand jury of the witness Emanuel Brown?

A. Yes, sir.

Q. Do you have those notes with you?

A. Yes, sir.

Q. Do they represent to the best of your ability an accurate record of what transpired before the grand jury?

A. Yes, sir.

[fol. 49] Q. Would you read them for the benefit of the Court?

A. (Reading):



"Mr. Wachtell: May the record note that the time is now 2.50 p.m.

"By Mr. Wachtell:

"Q. Mr. Brown, have you consulted with your attorney, Mr. Shapiro, since leaving the court room?

"A. I have spoken to him.

"Q. Now, Mr. Brown, Mr. Shapiro is outside, is that correct?

"A. Yes, sir.

"Q. I am going to put to you the six questions that you have previously declined to answer before this grand jury and that you have been directed to answer by Judge Levett of this court. 'Mr. Brown, are you associated with Young Tempo, Incorporated?'

"A. I refuse to answer on the grounds that I have not had sufficient time to consult with counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company?'

"A. I refuse to answer because I have not had sufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company?'

"A. I refuse to answer because I have not had sufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

[fol. 50] "Q. 'Mr. Brown, are you associated with the Acme Dress Company in Midvale, N. J.?'

"A. I refuse to answer on the grounds that I have not had sufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, does the T & R Trucking Company

provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, N. J.?"

"A. I refuse to answer because I have had insufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. 'Mr. Brown, do you know if the T & R Trucking Company or the T & R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, N. Y. and Midvale, N. J.?"

"A. I refuse to answer because I have had insufficient time to consult with my counsel, and I further refuse to answer because by answering I may tend to incriminate myself.

"Q. Now, Mr. Brown, do you understand that you were directed to answer these six questions and each of them at this time before this grand jury by Judge Levett of this court?"

"A. May I talk to my lawyer, please?"

"The Foreman: Yes.

"Witness leaves room and returns.

"Q. Mr. Brown, you understand, of course, that you are still under oath?"

"A. Yes, sir.

"(Question, 'Now, Mr. Brown, do you understand that you were directed to answer these six questions and each of them at this time before this grand jury by Judge Levett of this court?' read to witness.)

[fol. 51] "The Witness: I understand, but I must respectfully continue to refuse to answer on the grounds that I presented before.

"Mr. Wachtell: Mr. Foreman, may we have the witness excused temporarily with the direction to remain outside for further instructions?"

"The Foreman: Would you please wait outside?"

"(Witness excused)"

Mr. Wachtell: No further questions.

The Court: You may step down and wait.

Now I take it, Mr. Wachtell, that you wish me to ask the witness these various questions?

Mr. Wachtell: I do, your Honor.

The Court: (To Mr. Brown) Will you take the stand here then.

Mr. Shapiro: I take exception and object to this proceeding.

The Court: Overruled.

Mr. Shapiro: I respectfully except.

If your Honor please, I also base my objection on the ground that the witness is now being asked in a criminal cause to be a witness, and therefore in violation of the Constitution he is being asked to testify against himself, irrespective of the question of privilege or immunity. I submit to your Honor that this man cannot be asked to take the stand and be sworn as a witness or to be compelled to testify.

The Court: Overruled.

Mr. Shapiro: I respectfully except.

The Court: The immunity statute protects him.

Mr. Shapiro: I disagree with your Honor on that.

[fol. 52] The Court: Do you want him sworn again?

Mr. Wachtell: No, I do not think it is necessary.

The Court: He has been sworn, I assume.

Mr. Wachtell: That is correct.

Mr. Shapiro: I object to the characterization of his being sworn. I have not seen him sworn.

The Court: That does not alter the fact.

Mr. Shapiro: This is not the grand jury proceeding, your Honor.

The Court: It is a continuance of the grand jury proceeding, before the Court.

Mr. Shapiro: I respectfully except and I object to this proceeding.

Mr. Wachtell: For the convenience of the Court I have a transcript here of the proceedings of last Friday which would incorporate these questions, the six questions that are now before the Court.

The Court: That is why I asked Mr. Benson to remain.

EMANUEL BROWN, called as a witness, was examined and testified as follows:

By the Court:

Q. I am going to ask you these questions, Mr. Brown. Mr. Brown, are you associated with Young Tempo, Incorporated?

Mr. Shapiro: I object to the question, your Honor.

The Court: Overruled.

Mr. Shapiro: And your Honor putting this question and interrogating this man in a criminal cause.

[fol. 53] The Court: Overruled.

Mr. Shapiro: I except.

A. I refuse to answer the question because by answering I might tend to incriminate myself.

Q. And do you insist upon that and you still refuse to answer?

A. Yes.

Q. Now, Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: I except.

A. I refuse to answer because by answering I may tend to incriminate myself.

Q. You insist upon that still?

A. Yes.

Q. Now, Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company?

Mr. Shapiro: If your Honor please, I respectfully object.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer because my answer may tend to incriminate me.

Q. You still insist upon that answer?

A. Yes, sir.

Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: If your Honor please, I object.

The Court: Overruled.

Mr. Shapiro: Exception.

[fol. 54] A. I refuse to answer because by answering I might tend to incriminate myself.

Q. You insist upon not answering, is that correct?

A. Yes, sir.

Q. Mr. Brown, does the T & R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: If your Honor please, I object to that.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I still refuse to answer the question. My answer might tend to incriminate me.

Q. You insist upon not answering, is that correct?

A. Yes, sir.

Q. Mr. Brown, do you know if the T & R Trucking Company or the T & R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

Mr. Shapiro: If your Honor please, I respectfully object.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer because by answering I might tend to incriminate myself.

Q. Do you insist upon that answer?

A. Yes, sir.

The Court: I will have to direct him to answer. That is the end of the questions?

[fol. 55] Mr. Wachtell: I believe that is the sixth question.



The Court: Now I direct you to answer all of these questions, Mr. Brown.

Mr. Shapiro: I object, your Honor.

The Court: The first question is, and I shall repeat for your benefit so there will be no misunderstanding whatsoever. I direct you to answer this question:

Are you associated with Young Tempo, Incorporated.

Mr. Shapiro: I object, your Honor, to the direction and the question.

The Court: Overruled.

Mr. Shapiro: I except.

Q. Do you refuse to answer?

A. I do.

Q. I direct you to answer this question, Does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company?

Mr. Shapiro: I object, your Honor, to the direction and to the question.

The Court: Overruled.

Q. Do you refuse to answer?

A. I refuse to answer.

Q. In each case upon the grounds previously stated by you?

A. Yes, sir.

Q. The next question I direct you to answer is this: Who do you know to be the owner or owners of the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company?

[fol. 56] Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer because it might tend to incriminate me.

Q. I direct you to answer this question: Are you associated with the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer.

Q. I direct you to answer this question: Does the T & R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer for the previous reasons.

Q. Do you know, Mr. Brown, and I direct you to answer this question: Do you know if the T & R Trucking (sic) Company or the T & R Trucking Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, N. Y. and Midvale, New Jersey?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

[fol. 57] A. I refuse to answer on the same ground.

The Court: That was the sixth question.

Mr. Wachtell: The Government's other request, your Honor, would be that the witness be asked whether he would maintain his refusal to answer if he returned to the grand jury room.

Q. You have declined to answer these questions here before me in this courtroom and before this grand jury which is here. Do I understand that you will maintain that position and that you will not answer if you are returned to the grand jury room, to answer these questions?

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. Yes, sir.

Q. And do you believe that these answers will incriminate you?

Mr. Shapiro: I object to that question, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

Q. Do you believe that the answers to these questions just asked you would incriminate you in any way?

Mr. Shapiro: I object to that as wholly improper, your Honor, a violation of his privilege.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I refuse to answer.

[fol. 58] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Very well. By reason of your refusal to answer in the actual presence of this Court, I am forced to act upon this matter.

Mr. Wachtell: The Government rises, if your Honor pleases, solely for the purpose that if your Honor is going to hold the witness in contempt, the Government would want to be heard on the question of sentence, before sentence is imposed.

The Court: I shall hear you.

Mr. Wachtell: At this time?

The Court: At this time.

Mr. Shapiro: If your Honor please, I object again to this whole proceeding and ask again for a notice and specifications and an opportunity to be heard.

The Court: Overruled.

Mr. Shapiro: Exception.

Mr. Wachtell: The Clerk points out, your Honor, that as yet there is no judgment. Perhaps the procedure would be best that if you intend to hold the witness in contempt—

The Court: I will listen to any motion you may wish to make with reference to contempt and the sentence of punishment, and I will listen to counsel now, if you have nothing to say first as to any reason why I should not hold this witness in contempt.

Mr. Wachtell: I have nothing to add on the question of the judgment as to contempt.

The Court: Do you wish to say anything?

Mr. Shapiro: Yes, your Honor.

The Court: Very well.

[fol. 59] Mr. Shapiro: If your Honor please, in opposition to a finding of contempt I urge, first that your Honor has misapprehended the provisions of Section 305(d) and Section 46 of Interstate Commerce Act, and by virtue of those sections no immunity is obtained by this witness in testifying before the grand jury. Even if there were some semblance of immunity, it is not coextensive with the full constitutional privilege and it is not such as to warrant any compulsion upon him to testify.

I reiterate the question of the other grand jury proceeding pending in this court I again urge the Court to enable us to have a full hearing on the issues of fact involved here as to the other grand jury proceedings and to require the grand jury stenographers to produce here the minutes of those proceedings so that the Court may see what the inquiries were in that proceeding and see the possible jeopardy, the potential jeopardy, to which this respondent is subjected.

I object to this whole procedure on the ground that irrespective of the question of immunity, Mr. Brown's constitutional rights in a criminal cause have been seriously infringed, both in respect to being compelled to take the stand and being sworn and being asked questions.

Further, in being asked in a proceeding entirely separate from the grand jury proceeding as to whether he believes certain things to be true as to whether he believes that answering these questions would incriminate him, and I say [fol. 60] to your Honor that it is a violation of his privilege against self-incrimination and no possible touching upon that has happened in the grand jury proceeding, and therefore such a question is barred by the privilege against self-incrimination.

I say that the failure to give us notice and an opportunity to defend, since the witness has been in jeopardy throughout this proceeding, is violative of due process and all of Mr. Brown's rights under the Constitution.

I say that the United States Attorney is merely using this proceeding as a device or subterfuge artifice to get

around this man's constitutional rights. I respectfully state to the Court that no finding of contempt should be made here. The claim of self-incrimination is made in good faith and is based upon actual situations, and therefore again ask the Court not to find him in contempt.

The Court: Do you want to reply?

Mr. Wachtell: The Government has no reply. The Government's position has been indicated.

#### ADJUDICATION OF CONTEMPT

The Court: Very well.

I hereby adjudicate this witness in contempt. I will listen to the Government in so far as punishment is concerned.

Mr. Wachtell: On the question of sentence, your Honor, the inquiry in this case is, of course, a separate grand jury investigation. None the less, as counsel for Mr. Brown has indicated frequently here, the subject matter to some extent and the witness Mr. Brown himself have been before other grand juries investigating, as I believe I stated to your Honor, on Friday, the Victor Reisel obstruction of [fol. 61] justice case as well as the general racket investigation being conducted for the past year in this district.

It is the Government's information, as the questions attempted to bring out in this case, that the witness, Mr. Brown, has been associated in certain respects with certain persons who are the subject of these investigations, the present one included as to an interstate commerce investigation, these persons being John Dioguardi and Theodore Ray, as well as possibly others.

The information that it is desired to elicit from this witness, I represent to the Court, is of the very greatest importance, and the witness' refusal to answer is a very great stumbling block to this investigation and to all these investigations.

The reason that I refer now to the prior investigations is that the Government believes that the witness by obstinately refusing to answer here, despite the fact that he would be getting full immunity is clearly evinced by the fact that his former pleas as to the Fifth Amendment as a witness before the former grand juries were not ad-



vanced in good faith, were not advanced because of any real fear of self-incrimination, but rather were used as a shield upon which the witness could refuse to perform his duties as a citizen and as a sworn witness, namely, to give truthful and honest testimony as to facts within his knowledge.

For these reasons, your Honor, although the Government never makes specific recommendations as to sentence in any criminal matter, as your Honor knows, the Government [fol. 62] here would ask for a substantial sentence, and that is done not so much for any punitive effect as it would be for the coercive effect of the sentence.

Under the statute there is no maximum penalty upon the sentence that your Honor may impose. The only maximum is that imposed by the Constitution against cruel and unusual punishment.

I would further ask your Honor specifically that in imposing sentence here your Honor not include a purge clause. And the reason that I make that request is as follows:

As the law is at present, should a purge clause be included in your Honor's sentence, this witness could not be imprisoned, as I understand the law, once this grand jury properly should be no longer in session. That has been stated in various cases, including the Loubriel case in this circuit, as well as the Yates case in the Ninth Circuit.

The same practical effect of the purge clause can be gathered by a straight sentence. And the reason I say that is this:

Should the defendant at any future time desire to come forward and give the testimony that is required of him, your Honor, under the provisions of Rule 35 of the Federal Rules of Criminal Procedure, could within 60 days from the termination of all proceedings in this matter, whether that be proceedings here or whether there should be an appeal or from the ultimate disposition of any appeal, within 60 days your Honor could take into consideration all of the facts and effectually purge the sentence by reducing it.

[fol. 63] Furthermore, should there be a purge clause, the witness would be in a position to hamstring this grand jury indefinitely. For instance, should he appeal and should

the matter take some time in the courts he could at the end of the appeal, should the appeal be adverse, could come forward and answer these six questions precisely and then begin all over again as to any further questions.

Should you impose a straight sentence, your Honor would be able to take all the questions into account as to the question as to whether there is genuine merit.

Mr. Shapiro: If your Honor please, I am surprised at the U. S. Attorney's position here. He is not asking you to punish Mr. Brown for whatever may have gone on before this grand jury. He is asking you to punish him for using his privilege against self-incrimination in another grand jury investigation. He is trying to impose a penalty upon a man because he rightfully, undoubtedly rightfully, invoked his Fifth Amendment privilege in the other grand jury proceeding.

The Court: I am not concerned with that. I do not think that is his contention.

Mr. Shapiro: That is what he said, your Honor.

The Court: I do not interpret it that way. Is that all you wish to say?

Mr. Shapiro: Yes, your Honor, except that I reiterate my legal position as I have stated before here.

The Court: I am forced to disagree with that.

(To the witness) You may step down.

(Witness excused.)

[fol. 64]

#### SENTENCE

The Court: My adjudication is that he be confined for a period of one year and three months.

#### REQUEST FOR BAIL AND DENIAL THEREOF

Mr. Shapiro: If your Honor please, may we have the respondent released on bail pending appeal? There are serious questions of law involved in this case. As a matter of fact, one of the most serious questions is now before the Supreme Court of the United States on certiorari, and this man should have bail on that basis alone.

There are other serious questions involved, such as whether there is any actual immunity, and therefore I respectfully submit to your Honor that this man should be released on bail pending the disposition of this appeal.

Mr. Wachtell: The Government's position on that is as follows:

Under the rules, of course, bail cannot be granted should the appeal be deemed frivolous.

Basically Mr. Shapiro has raised two questions. One is the question of procedure that has been followed here and the other is the substantive question of immunity. The question of procedure is one that is before the Supreme Court only tangentially and is one that has been specifically and recently reaffirmed by this circuit in the Curcio case and has been followed, as previously pointed out, in other cases in this and in other circuits.

The substantive question the Government feels is clear, and I am not going to reiterate all the arguments that I have made previously. However, even if the Court deems this appeal not to be frivolous, the Court nevertheless retains discretion to deny bail pending appeal. And the [fol. 65] Government feels specifically as to the standards that are set forth under Rule 46 that it appears that the appeal has been taken for the purpose of delay. I believe that language is there. Specifically in a case such as this, where a grand jury proceeding has been put at a standstill, and where apparently, and I say this from the repeated requests that have been made here for adjournment, although no rational basis for any adjournment would appear, it would appear that the design of the witness is to gain delay and gain time and hold up this grand jury investigation of inquiry.

For that reason, even if your Honor feels that the appeal is not frivolous, the Government would ask that the application for bail pending appeal be denied. Counsel can, of course, always apply to the Court of Appeals.

I would also point out, in passing, that there has to be an order and a certificate—

The Court: I direct you to prepare the order and submit it to me.

Mr. Wachtell: The Government will, your Honor.

Mr. Shapiro: If your Honor please, the issue of procedure is not in the Curcio appeal tangentially. It is a direct question presented to the Supreme Court of the United States on a petition for writ of certiorari. It is one of the questions which is being briefed now and will be argued before the Supreme Court of the United States. Where the Supreme Court has granted certiorari, I do not see how anybody can argue that such an appeal is frivolous. Actually there is merit to it because the Supreme Court has said, "We are going to hear arguments about it."  
[fol. 66] Mr. Wachtell relies on the Curcio case, and that is the very case that the Supreme Court is granting certiorari on.

This man is a family man. He has a child and a wife. He is a business man and there is no fear at all that this man is going to leave the jurisdiction and not be available for whatever may happen on his appeal.

The questions raised here are substantial, and there is no interest in delay.

The Court: Irrespective of whether the questions are substantial or not, under the circumstances and at the discretion of this Court I will deny bail.

Mr. Shapiro: I respectfully except to your Honor's ruling.

May we have until tomorrow at 4 o'clock to surrender, your Honor? After all he has a family and he has a business to make arrangements about.

The Court: Any objection?

Mr. Shapiro: Another day is not going to delay this much longer, is it, your Honor?

Mr. Wachtell: No objection.

The Government will prepare the order and the certificate in the meantime.

The Court: Yes. It is granted.

Mr. Wachtell: 4.00 p.m.

The Court: 4.00 p.m. tomorrow.

[fol. 67]

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 388—October Term, 1956.

(Argued May 6-7, 1957.)

Docket No. 24626

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UNITED STATES OF AMERICA, Appellee,

v.

EMANUEL BROWN, Defendant-Appellant.

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OPINION—July 10, 1957

Before: Medina, Hincks and Lumbard, Circuit Judges.

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Emanuel Brown appeals from a sentence of 15 months imprisonment for contempt of court in refusing to answer questions propounded to him before a grand jury in the Southern District of New York in an investigation under the Motor Carrier Act, 49 U. S. C. A. §§301-327. The District Court ordered him to answer, ruling that thereby he received immunity from prosecution under 49 U. S. C. A. §305(d) and §46. Richard Levet, Judge. Affirmed.

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[fol. 68] Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y. (Herbert M. Wachtell, Assistant United States Attorney, of counsel), for appellee.

Myron L. Shapiro, New York, N. Y., for defendant-appellant.

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**LUMBARD, Circuit Judge:**

Emanuel Brown appeals from a judgment of conviction and a sentence of 15 months imprisonment for refusing to answer questions before a grand jury which was investigating alleged violations of the Motor Carrier Act, 49 U. S. C. A. §§301-327 despite assurances that under the applicable provisions of law, 49 U. S. C. A. §§305(d), 46, he would be immune from prosecution regarding any matters concerning which he would be required to testify.

As Brown questions the propriety of the procedure resulting in the judgment, as well as the existence and extent of the immunity conferred and the severity of the sentence imposed, we first consider the sequence of events before the grand jury and the court.

On Friday, April 5, 1957, Brown was called before a grand jury which he attended pursuant to the command of a subpoena. This grand jury was conducting an investigation into an alleged violation of the Motor Carrier Act. Although advised by the Assistant United States Attorney that he could not be prosecuted on account of any matter concerning which he would testify under the Motor Carrier Act, Brown refused to answer these six questions:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

[fol. 69] Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T and R Trucking Company?

Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Brown are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has ap-

plied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?"

Thereupon the grand jury attended before Judge Levet to seek his aid and assistance in a direction to Brown, who was present with his counsel, that he answer the questions. At the suggestion of the government the courtroom was cleared of all but the interested parties and court personnel, no objection being then made to this procedure.

At this first hearing, government counsel stated that Brown's testimony was sought because Young Tempo, Inc., a New York City dress manufacturing firm in which Brown was a principal, had used the T and R Trucking Company or the T and R Cutting Company for trucking. The government stated that its inquiry was directed to the true ownership of these trucking companies and their operation between New York and New Jersey, contrary to law, without a permit from the Interstate Commerce Commission.

[fol. 70] Although Brown's counsel had been advised eleven days before, on March 25, that Brown was to be questioned on these matters under the Motor Carrier Act, he asked for a "reasonable adjournment" and notice of the specifications or charges in order to prepare for the hearing.

When the judge asked counsel what proof he might wish to present, counsel replied that he would like to look into the question of whether he could compel production of the minutes of prior grand jury investigations in which Brown had pleaded the Fifth Amendment.<sup>1</sup>

Brown's counsel asserted the investigation was being used "as a means of circumventing the exercise by Brown of his Fifth Amendment privilege to refuse to testify before the other grand jury," which government counsel denied.<sup>2</sup> There followed a colloquy regarding the existence

<sup>1</sup> These investigations related to the Victor Reisel acid blinding case, and to racketeering in the garment trucking industry.

<sup>2</sup> Brown's counsel also stated that the Assistant United States Attorney had threatened Brown with indictment under the revenue laws. There is nothing in the record to substantiate this statement.

and scope of the immunity available to a grand jury witness under 49 U. S. C. A. §305(d) and §46, which we treat as the principal questions before us.

The grand jury reporter was then called as a witness and testified that Brown refused before the grand jury to answer each of the six questions on the ground that by answering he might tend to incriminate himself. A recess was taken until Monday afternoon, April 8.

On Monday, Brown and his counsel again appeared before Judge Levet. After the judge had indicated that he would instruct Brown to answer because the statute gave him full immunity, Brown's counsel asked for an adjournment of a day or so for further discussion with his client. The judge refused to allow more than half an hour and directed that the questions be answered before the grand [fol. 71] jury at 2:45 P. M. After Brown's reappearance the grand jury returned to the courtroom at 3:15 P. M. and reported Brown's continued refusal to answer. The government then asked that the court again put the questions to Brown and suggested that Brown's persistent refusal in the physical presence of the court would justify his being summarily held in contempt under Rule 42(a) of the Federal Rules of Criminal Procedure.

Brown, who had already been sworn before the grand jury, was called to the stand by the district judge. His counsel objected to this procedure, apparently on the ground that Brown was now a defendant in a criminal contempt case, but this was overruled. The questions were again put by the court and Brown refused to answer each question on the ground that it might tend to incriminate him. After Brown's counsel again repeated his arguments why Brown should not be compelled to answer, the Court adjudged Brown to be in contempt, under 18 U. S. C. A. §401, and sentenced him to be confined for one year and three months.

### 1. *Immunity under the Motor Carrier Act.*

We start with the general proposition that where Congress has granted immunity from prosecution coextensive with the protection of the Fifth Amendment, the witness

may not refuse to testify on the claim that he may incriminate himself. *Brown v. Walker*, 161 U. S. 591 (1896) decided that with respect to the same §46 here in question, then 27 Stat. 448, Act of February 11, 1893. *Ullman v. United States*, 350 U. S. 422 (1956) is the latest affirmation of this principle with respect to the Immunity Act of 1954.

Brown claims, however, that Congress did not intend to make the immunity provisions of §46 of the Interstate Commerce Act apply to grand jury investigations of all [fol. 72] leged offenses under the Motor Carrier Act. We do not agree. We find that a reading of the applicable sections of the Interstate Commerce Act shows that Congress intended that witnesses testifying in a grand jury inquiry under those sections having to do with motor carriers would receive immunity just as if they were testifying in a grand jury inquiry under Title I.

The second clause of 49 U. S. C. A. §305(d) affords immunity in grand jury proceedings under the Motor Carrier provisions, Chapter 8, by incorporating, the "rights, privileges and immunities" and "the duties, liabilities, and penalties" of witnesses as stated in §46 of Title I.

Section 305(d)<sup>3</sup> in its pertinent words provides:

" \* \* \* and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, \* \* \* "

<sup>3</sup> Section 305(d) reads: "So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter."



Section 46<sup>4</sup> provides in part:

"No person shall be excused from attending and testifying \* \* \* in any cause or proceeding, criminal, or other [fol. 73] wise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify \* \* \* in any such case or proceeding; \* \* \*"

It seems to us that the natural meaning of the reference in §305(d) to §46 is that whatever is within the scope of the latter is to be incorporated into the former. Hence the immunity applies to grand jury investigations under Chap-

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<sup>4</sup>The full text of §46 is: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding; Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."



ter 8, the Motor Carrier Act, just as it does to such investigations under Chapter 1.

Brown's argument is that since the first clause of §305(d) grants investigatory power only to the Commission, for [fol. 74] "any matter under investigation," the reference in the immunity clause of §305(d) to "any matter under investigation under this chapter" should be read *in pari materia* with the empowering clause to mean "under investigation under this chapter *by the Commission*." Consequently, §305(d) is limited to hearings before the Commission and does not apply to matters before grand juries and courts. We do not agree. It seems clear that if §46 applies at all it applies equally to "any cause or proceeding, criminal or otherwise." There is no qualifying language. On the contrary, §305(d) in plain words has made the immunity applicable to "*any* matter under investigation under this chapter." [Emphasis added.] This is not limited to any matter under investigation before the Commission. Furthermore, Chapter 8 provides in §322 for criminal prosecutions and penalties for the enforcement of its various provisions, 49 U. S. C. A. §§301-327. Thus the power to compel testimony is as natural to and as much wedded to Chapter 8 as it is to Chapter 1. Moreover, we are unable to see anything peculiar to motor carrier investigations which would justify a construction of the immunity provision narrower than that applicable to investigations relating to the other forms of transportation under the Interstate Commerce Act.

The language is clear, the construction for which the government contends is practical and sensible, and there is no reason why we should not construe the language according to its plain meaning.<sup>5</sup> *United States v. Missouri Pacific R. R. Co.*, 278 U. S. 269, 278 (1929).

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<sup>5</sup> Congress has made grants of immunity applicable to grand jury proceedings under numerous statutes both before and after enactment of the Motor Carrier Act in 1935, among others: (1893) Interstate Commerce Act, now 49 U. S. C. A. §46; (1903) Anti-Trust Laws, 15 U. S. C. A. §32; (1916) Shipping Act, 46 U. S. C. A. §827; (1919) National Prohibition Act, 41 Stat. 317; (1933) Securities Act of 1933, 15 U. S. C. A. §77v(c); (1934) Securities and Exchange Act, 15 U. S. C. A. §78u(d); (1934)

[fol. 75] Brown's second argument is that even if §305(d) incorporates the immunity granted by §46, this is inadequate protection. He claims that it does not provide immunity for offenses not related to violations of the Motor Carrier Act because the immunity under §305(d) can be granted only "so far as may be necessary for the purposes of this chapter."

We do not believe the immunity is so limited. The statutory language does not imply that immunity is to be limited to offenses under the Motor Carrier Act; immunity for an offense under the revenue laws may be equally necessary "for the purposes of this chapter," precisely for the reasons suggested in this case. The scope of immunity must be as broad as the scope of incrimination, see *Counselman v. Hitchcock*, 142 U. S. 547 (1892), and we see no reason to think that any court will construe it more narrowly. Thus where Congress has said that the witness "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, \* \* \*" Congress has said that the witness cannot and will not incriminate himself by answering questions. This covers, and is meant to cover, everything which may be testified to, "any transaction, matter or thing." *United States v. Andolschek*, 142 F. 2d 503, 506 (2 Cir. 1944).

Should proceedings ever be brought against Brown regarding any transaction, matter or thing concerning which he testifies, he has a complete defense at that time. The

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Federal Communications Act, 47 U. S. C. A. §409(e); (1935) Industrial Alcohol Act, 26 U. S. C. A. §5315; (1935) Internal Revenue Act, 49 Stat. 875, now §5315, Internal Revenue Code of 1954, 26 U. S. C. A. §5315; (1935) Federal Power Act, 16 U. S. C. A. §825f(g); (1935) Public Utility Holding Company Act, 15 U. S. C. A. §79r(e); (1937) Bituminous Coal Act, §8(b), 50 Stat. §87; (1938) Civil Aeronautics Act, 49 U. S. C. A. §644(i); (1938) Natural Gas Act, 15 U. S. C. A. §717m(h); (1940) Investment Advisors Act, 15 U. S. C. A. §80b-9(d); (1940) Investment Companies Act, 15 U. S. C. A. §80a-41(d); (1940) Water Carriers Act, 49 U. S. C. A. §916(a); (1942) Second War Powers Act, 50 U. S. C. A. App. §643(a); (1942) Freight Forwarders Act, 49 U. S. C. A. §1017(a); (1954) Immunity Act of 1954, 18 U. S. C. A. §3486(e); and (1956) Narcotics Control Act, 18 U. S. C. A. §1406.

immunity attaches with the testimony. *United States v. Monia*, 317 U. S. 424 (1943); *United States v. Andolschek*, *supra*. Even though the witness is already under indictment he must testify as he thereby is put beyond the reach of further prosecution. That much was decided by Judge Learned Hand in 1910 in *In re Kittle*, 180 Fed. 946, and this principle has never been questioned in any reported case. From this it follows that Brown has no right to remain silent because of some fancied prosecution which may never happen. It is enough for him to know that he is fully protected. The government has been empowered by Congress to pay the price of immunity for Brown's testimony. Should the need ever arise the courts will see to it that the bargain is fully kept.

Thus it follows that what may have happened when Brown testified before other grand juries is irrelevant in the light of the fact that he would receive immunity when he testified in the investigation under the Motor Carrier Act, and the district judge correctly refused to consider what Brown may have testified to previously or what may have transpired before those grand juries.

## 2. *The Validity of the Procedure.*

Brown further complains that in the District Court proceedings he was deprived of his rights to notice and a hearing under Rule 42(b) of the Federal Rules of Criminal Procedure, and that the fundamental safeguards due him in a criminal proceeding were not accorded. We disagree. [fol. 77] In cases where the witness is instructed by the Court and he refuses in the presence of the Court to comply with its order, we look to subsection (a) of Rule 42 which reads:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

The Court having properly ruled that Brown must answer the questions, it was in order for the Court to require Brown to return to the grand jury and answer. When Brown persisted in his refusal to answer and repeated that refusal before the Court, Brown had disobeyed a lawful order of the Court, 18 U. S. C. A. §401(3) and as his disobedience and contempt of the Court's order had taken place in the "actual presence" of the Court, the judge was empowered under Rule 42(a) forthwith and summarily to punish Brown.

Brown and his counsel were afforded every reasonable opportunity to be heard regarding Brown's claim of privilege and the Court's proposed action thereon. While the issue had some novel aspects under the Interstate Commerce Act, counsel was advised of them well in advance of the first hearing on April 5 when the questions were first put to Brown. At that time and thereafter on April 8 the judge afforded Brown and his counsel full opportunity to be heard. The procedure here followed is almost identical with that which was before us in *United States v. Gordon*, 236 F. 2d 916 (1956); *United States v. Courtney*, 236 F. 2d 921 (1956); *United States v. Curcio*, 234 F. 2d 470 (1956), reversed by the Supreme Court on other grounds, June 10, 1957; *United States v. Trock*, 232 F. 2d 839 (1956), reversed [fol. 78] on other grounds 351 U. S. 976 (1956). See also *Carlson v. United States*, 209 F. 2d 209 (1 Cir. 1954).

The procedure which was followed here fully accorded to Brown all his rights under §42(a): he was given ample notice, he was represented by counsel and his counsel was fully heard.

There is good reason for providing for such summary procedure and for applying it to contumacious grand jury witnesses. The public interest requires that grand juries should suffer a minimum of delay in their investigations. Each delay of such an inquiry, however brief, multiplies the difficulties in getting facts, locating witnesses and finding the truth. Law enforcement faces enough difficulties without the added hazard of the unnecessary delays due to protracted hearings and adjournments which are not necessary. The district judge acted promptly and with commendable diligence. At the same time he afforded Brown



and his counsel a full and adequate hearing at which all the points raised in this court, save one, were discussed.

The one point which was not raised below was the secrecy of the proceedings. Not having objected to the clearing of the courtroom at the time, we do not see how Brown can be heard to complain now. So long as the witness' counsel was there to represent him and to make protest Brown has no standing to complain now. *In re Oliver*, 333 U. S. 257 (1948), is not in point as there the state judge, who was himself the one-man grand jury, forthwith convicted the petitioner in a secret session without any advance notice and without allowing him any time to consult counsel.

Finally, Brown's contention that he was entitled to the right of a criminal defendant to refuse to answer any questions before the district judge is rejected. In the first place, this hearing before the district judge was, despite Brown's argument to the contrary, merely a proceeding ancillary to the grand jury investigation and not a criminal [fol. 79] proceeding. In the second place, preventing the Court from inquiring of the witness whether he is willing to answer questions would frustrate the proper operations of the grand jury, and without affording the witness any protection which is not already accorded him. The Court is merely being advised as to what had already happened before the grand jury. Brown had already made it clear, both to the grand jury and the Court that he refused to answer. Had Brown remained mute and refused to speak at all, the result would have been the same.

Brown further complains that a sentence of 15 months constitutes cruel and unusual punishment in violation of the Eighth Amendment, or, in any event, an abuse of the Court's discretion. We find no merit to either of these contentions.

There is no statutory maximum which governs the power of the district court judges to sentence for contempts committed in their presence. Therefore unless the punishment offends the prohibition of the Eighth Amendment by reason of its cruel and unusual nature we must affirm the sentence imposed. For failure to produce books subpoenaed by a grand jury it has been held that 18 months imprisonment is not excessive. *Lopiparo v. United States*, 216 F. 2d 87, 92



(8 Cir. 1954), cert. denied 348 U. S. 916 (1955). We have heretofore sustained sentences up to three and four years where defendants have violated court orders to surrender, *United States v. Thompson*, 214 F. 2d 545 (2 Cir. 1954), cert. denied 348 U. S. 841 (1954); *United States v. Hall*, 198 F. 2d 726 (2 Cir. 1952), cert. denied 345 U. S. 905 (1953); and *United States v. Green*, 241 F. 2d 631 (2 Cir. 1957), cert. granted May , 1957.

That it has long been understood that the district courts have a considerable latitude in contempt sentences is further borne out by such cases as *Warring v. Huff*, 122 F. 2d 641 (D. C. Cir.), cert. denied 314 U. S. 678 (1941), two [fol. 80] consecutive sentences of 13 months; *Conley v. United States*, 59 F. 2d 929 (8 Cir. 1932), two years; and *Hill v. United States*, 300 U. S. 105 (1937), concurrent sentences of a year and a day and two years. In view of these precedents it cannot be said that there was anything cruel or unusual about the sentence of 15 months which was imposed here.

Nor was the district court obliged to provide that the contemnor might purge himself. The judge fully considered whether he should so sentence Brown, and for good and sufficient reasons the sentence was unconditional. Indeed, we are not advised that Brown desires to purge himself.

There is no point in inquiring into whether the district judge meant the sentence to be coercive or punitive. The sentence was well within the power of the district court and that is the only question into which we may inquire.

The judgment is affirmed.

[fol. 81]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**UNITED STATES OF AMERICA, Plaintiff-Appellee,**

**v.**

**EMANUEL BROWN, Defendant-Appellant.**

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**JUDGMENT—July 10, 1957**

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 83] Clerk's certificate to foregoing transcript (omitted in printing).

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[fol. 84] **SUPREME COURT OF THE UNITED STATES**

[Title omitted]

**ORDER ALLOWING CERTIORARI—April 7, 1958**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.